TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~464.~~ 2257

JABEZ DOOLEY, PLAINTIFF IN ERROR,

vs.

ENOCH SMITH.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 4, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 464.

JABEZ DOOLEY, PLAINTIFF IN ERROR,

vs.

ENOCH SMITH.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To Enoch Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington City on the 5th day of December next, pursuant to a writ of error filed in the clerk's office of the court of appeals for the State of Kentucky, wherein Jabez Dooley is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable S. P. Chase, esq., Chief Justice of the Supreme Court of the United States, this ninth day of June, in the year of our Lord 1870, and of our independence the 94th.

RUFUS K. WILLIAMS,
Chief Justice of Appellate Court of the State of Kentucky.

2 I, Thomas Taul, of Bath County, Kentucky, do hereby certify that I did, on the 18th day of June, 1870, execute the within citation on the defendant Enoch Smith by delivering to him a true copy of the same.

THOMAS TAUL.

STATE OF KENTUCKY, *Montgomery County, set:*

Sworn to by Thomas Taul before me this 20th day of June, 1870.

H. R. FRENCH,
U. S. Commissioner.

(Indorsed:) Lodged in clerk's office, court of appeals, July 2, 1870.

A. DUVALL, *C. C. A.*,
By CHA'S HEYDON, *D. C.*

3 Know all men by these presents, that whereas in a suit pending in the court of appeals of the State of Kentucky, in which Jabez Dooley was appellant and Enock Smith was the appellee, in which suit the constitutionality of the act of Congress making United States treasury notes legal tender was involved, the said court of appeals has decided that said act of Congress is unconstitutional, from which decision the said Jabez Dooley intends to prosecute an appeal to the Supreme Court of the United States: Now, to accomplish said object the said Jabez Dooley and Obadiah Dooley, and James E. Hall, his sureties, do hereby constitute and appoint James Simpson, of Clark County, Kentucky, their agent and attorney in fact, with full power and authority to execute for them and in their names any bond or written obligation that the law may require the said Jabez Dooley and his sureties to give for the purpose of superseding the said judgment of *of* the court of appeals of the State of Kentucky in the suit aforesaid, or which may be required for any other purpose, in order to the due prosecution of said appeal in the Supreme Court of the United States.

4 Given under our hands and seals this 1st day of June, 1870.

JABEZ DOOLEY. [SEAL.]
OBADIAH DOOLEY. [SEAL.]
JAS. E. HALL. [SEAL.]

Attest:

[50-cent. inter. revenue stamp.]

JAMES D. SIMPSON.

STATE OF KENTUCKY, *Clark County, ss:*

Be it remembered, that on the 1st day of June, in the year of our Lord one thousand eight hundred and seventy, before me, the subscriber, clerk of the Clark County court, personally came Jabez Dooley, Obediah Dooley, and James E. Hall, the grantors in the foregoing letter of attorney, and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and seal of office at office in Winchester, Clark County, Kentucky, this 1st day of June, A. D. 1870.

[SEAL.] JOHN CATHERWOOD,
Clerk of Clark County Court.

5 COMMONWEALTH OF KENTUCKY:

Court of appeals of the State of Kentucky.

JABEZ DOOLEY, APPELLANT,
vs.
ENOCH SMITH, APPELLEE.

Know all men by these presents, that we, Jabez Dooley, Obadiah Dooley, and James E. Hall, are held and firmly bound unto the above-named Enoch Smith in the sum of twenty thousand dollars, to be paid to the said Enoch Smith, his executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this ninth day of June, A. D. 1870.

Whereas the above-named Jabez Dooley hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the court of appeals of the State of Kentucky:

Now, therefore, the condition of this obligation is such, that if the above-named Jabez Dooley shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JABEZ DOOLEY, [SEAL.]
OBADIAH DOOLEY, [SEAL.]
JAMES E. HALL, [SEAL.]
By JAMES SIMPSON,
Their Attorney in Fact.

6 Taken and acknowledged before me this 9th day of June, A. D. 1870.

RUFUS K. WILLIAMS,
Chief Justice of the Appellate Court of the State of Kentucky.

Which said bond is endorsed as follows:

Filed in clerk's office, court of appeals, June 10, 1870.

A. DUVALL, *C. C. A.*,
By CHA'S HAYDEN, *D. C.*

State of Kentucky, court of appeals.

I, Alvin Duvall, clerk of the court of appeals for the State of Kentucky, do certify that the foregoing four pages contain a true copy of the original power of attorney and supersedeas bond which are on file in my

office, with the papers in the cause therein mentioned, the power of attorney having been duly stamped with a 50-c. revenue stamp.

Given under my hand and the seal of said court this 2nd day of July 1870.

[SEAL.]

A. DUVALL, *Clk C't App.*,
By CHA'S HAYDEN, *Dep. Clk.*

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court of appeals, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Jabez Dooley, appellant, and Enoch Smith, appellee, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity, a manifest error hath happened, to the great damage of the said Jabez Dooley, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

8 Witness, the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 9th day of June, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

W. A. MERIWETHER,
Clerk of the Circuit Court of the United States,
District of Kentucky, at Louisville.

Allowed by—

RUFUS K. WILLIAMS,
Chief Justice of the Court of Appeals of Kentucky

9 State of Kentucky, court of appeals.

At a court of appeals of the State of Kentucky, held at the capitol in Frankfort, Ky., on the 10th March, 1870. Present, Williams, chief justice; Robertson, Hardin & Peters, judges.

JABEZ DOOLEY, APPELLANT,
vs.
ENOCH SMITH, APPELLEE.
} Appeal from a judgment of the Montgomery circuit court.

Be it remembered that on the 19th day of October, 1869, the appellant, by his attorney, filed in the clerk's office of the court of appeals the following transcript of the record in the above-named cause:

10 State of Kentucky, Montgomery circuit court.

Pleas before Hon. Richard Reid, special judge of the Montgomery circuit court, Mt. Sterling, Ky. March term, March 27th, 1869.

Petition in equity.

JABEZ DOOLEY, PLAINTIFF,
vs.
ENOCH SMITH, DEFENDANT. } Parties to the action.

Be it remembered that on the 11th day of February, 1868, the plaintiff, by his attorney, filed in the clerk's office of the Montgomery circuit court his original petition.

The plaintiff states that on the day of , 186 , he executed to the def't his prommissory note for the sum of ($8,079 83,) eight thousand seventy-nine dollars and eighty-three cents, due and payable the 15th day of March, 1862. Said note was given as the last payment for a tract of land purchased by plaintiff from def't near Mt. Sterling, Ky. Said note and interest on the 6th day of January, 1868,
11 amounted to $9,843 92, and on that day the plaintiff tendered to the defendant the full amount of said note and the interest thereon in United States legal-tender treasury notes, commonly called "greenbacks," which the def't refused to receive and surrender up pl'ff's note, although pl'ff demanded it. That prior to said tender the plaintiff had made partial payments thereon, and on the day he made the tender there was due thereon but $9,843 92, which amount he tendered as aforesaid.

He now here again tenders to the pl'ff herewith said United States legal-tender treasury notes the amount and sum last aforesaid, and the same are and will be tendered in open court.

He prays that the defendant may be compelled to receive the legal tender treasury notes aforesaid in discharge of his note aforesaid, and that defendant be compelled to deliver up his note aforesaid, and for all proper relief.

The plaintiff has at all times been willing and has repeatedly offered to pay said debt.

That about the 15th day of May, 1864, he tendered the def't full
12 amount due on said in United States legal-tender treasury notes, commonly called greenbacks, and the defendant refused to receive them and to surrender up his note, although the pl'ff demanded him to do so; and he prays that the pl'ff be now compelled to accept, in discharge of his note, the amount now due thereon in United States legal tender currency notes; & he prays, &c.

TURNER & CORNELISON, *P. Q.*

MONTGOMERY COUNTY, *set:*

Jabez Dooley says that the statements of this petition are true.

JABEZ DOOLEY.

Sworn to before me by Jabez Dooley, 11th of Feb'y, 1868.

J. M. CRAWFORD, *Clk,*
By J. C. TOMLINSON, *D. C.*

Affidavit of pl'ff to have process directed to jailor.

The pl'ff, Jabez Dooley, says that no sheriff or deputy can be obtained to serve the process in this case before the def't will have left the county of Montgomery, & he prays that the process be directed to the jailor.

JABEZ DOOLEY.

Jabez Dooley, the pl'ff, says that the statements of the above affidavit are true, as he believes.

Sworn to before me 11 day of Feb'y, 1868.

13 JAMES M. CRAWFORD, *Clk.*
By JNO. C. TOMLINSON, *D. C.*

Summons.

The process was duly executed by the jailor, and so returned by him.

At a circuit court held in the town of M't Sterling, for the county of Montgomery, on the 17th day of March, 1868, the following order was made herein, to wit:

Demur to pet'n filed & cont'n'd.

The defendant demurs to the petition. It is submitted upon demurrer, and is continued over.

Def't's demur.

The defendant, Enock Smith, states that the facts stated in the plaintiff's petition are not sufficient in law to enable him to recover in this action.

And afterwards, at a court held as aforesaid on the 19th day of March, 1868, the following order was made herein, to wit:

Consent order for Dooley to take & use the money as he pleases.

The parties appeared in court, and the defendant admitted that the sum mentioned in the plaintiff's petition had been tendered to him
14 at the time and in the manner therein alleged, in United States legal-tender treasury notes, and that said sum thus tendered had been brought by plaintiff into court in pursuance of said tender, and thereupon the defendant consented that the plaintiff might withdraw said sum of money and use it in any way he pleased, and that the legal effect of the tender should be the same as it would be if the money were to remain in court, and no other effect is to be given to this consent order by which the right of the defendant to contest the validity and legality of said tender is not to be in any manner affected.

And afterwards, at a court held as aforesaid on the 13th day of January, 1869, the following order was made herein, to wit:

Consent judge & order of consolidation.

JABEZ DOOLEY
vs.
ENOCH SMITH.

ENOCH SMITH
vs.
JABEZ DOOLEY.

By consent, Richard Reid will act as judge herein, and these cases are consolidated.

ENOCH SMITH
vs.
JABEZ DOOLEY.

15 Be it remembered that on the 11th day of August, 1868, the plaintiff, by his attorney, filed in the clerk's office of the Montgomery circuit court his original petition.

Plaintiff Smith's pet'n.

The plaintiff, Enock Smith, says that the defendant, Jabez Dooley, by his promissory note herewith filed as part hereof, dated Jan'y 6th, 1862, agreed to pay plaintiff the sum of eight thousand and seventy-nine dollars and eighty-three cents, on the 15th day of March next after date of said note. He says that said note was given for the third and last payment on land bought by the defendant from plaintiff. That the consideration of said note was land bought by def't from plaintiff, the same now occupied by the def't and known as the home place of the pl'ff, lying on the Maysville turnpike, in the county of Montgomery, and State of Kentucky, and said note and debt is a lien on said land, as it was given for the purchase money for the same, and said land is bound for the payment of said note and debt. The plaintiff says
16 he is ready and willing and able to convey the title to said land to the defendant, according to the contract of sale, which is filed herewith as part hereof, and has already made the def't a good and sufficient deed to said land, reserving a lien for the unpaid purchase money. He herewith files said deed and makes it part hereof, and tenders the same to def't as he has heretofore done. For a full and complete description of said land he refers to said deed, and says the metes and bounds of said land are correctly set forth in the same. He says said note is a lien on the land described and named in said deed, and no part of the same has been paid except the interest thereon up to May the 15th, 1864, as endorsed on the back of said note, leaving the rest due and unpaid.

Wherefore he prays judgment for his debt, and for an enforcement of his lien on said land, and a sale of the same, and that the proceeds of the sale be applied to the payment of his debt and for all equitable relief.

ELLIOTT & METCALFE,
For Pl'ffs.

17 STATE OF KENTUCKY, *Montgomery County:*

Enoch Smith says he believes the statements of this petition are true.

ENOCH SMITH.

Sworn to before me by Enoch Smith, this 11th day of August, 1868.
RICHARD REID, *Ex. M. C.*

Note.

$8,079 83.

On the fifteenth of March next I promise to pay unto Enoch Smith eight thousand and seventy-nine dollars eighty-three cents, being the last of the third payment upon his land; as witness my hand, this 16th of January, 1862.

JABEZ DOOLEY.

Credits.

Interest on the within paid to 15 Nov., 1863.
Int. paid to the 15th of May, 1864.

Contract of sale referred to in pl'ff's pet'n.

By virtue of a publick sale made by Enoch Smith, on the third of this month, and the said Smith having subjected his home farm to a public sale, and Jabez Dooley, of Bath, having become the highest bidder, and by this means the purchasor, said Dooley having thereby agreed
18 to pay to said Smith the sum of ninety-three dollars and 15 cents per acre. The land is bounded on the east by the turnpike road; on the north by the widow Williams and Harvey Wilson; on the west by William Fergerson; on the south by Virginia Batts, George Howard, and Emily Barnes. Containing, as by survey made by Jeremiah I. Orear, three hundred and thirty acres, or thereabouts. Now, in consideration of ninety-three dollars and fifteen cents per acre, the said Smith agrees to take one-third of the purchase money the fifteenth of March next, when full possession is to be given to said Dooley, and the balance in one and two annal payments thereafter. The said Dooley is to execute his notes for the last payments when possession is given him. The said Smith is to make a general warrantee deed when the money is all paid. The land to be measured surface measure from the centre of the turnpike all around. Said Dooley is to pay the tax on the land for the year 1860; also said Dooley is to have the liberty to crib corn,
19 break stubble or sod land, and a *a* pasture to feed stock at any time he may wish; repair fencing, &c.

Given under our hands this . The said Smith binds himself to take good care of the premises, commit no waste, and his wife is to relinquish her right of dower in said land.

November 11th, 1859.

(Signed duplicate)

ENOCH SMITH.
JABEZ DOOLEY.

Rec'ts on back of contract of sale.

Received of Jabez Dooley, this 5th of January, 1860, three thousand dollars, in part of the first payment on my land, to bear eight per cent. interest on the same until the midle of March next; as witness my hand this day and date above written.

ENOCH SMITH.

Rec'd the balance of the first payment in full, ($10,246 50,) M'ch 17th 1860.

ENOCH SMITH.

Rec'd thirty-four hundred & seventeen dollars & fifty cents, part of the second payment of land, M'ch 14, 1861.

ENOCH SMITH.

Rec'd one thousand dollars on the within 2nd payment of land, through Boyd, Congleton & Co., Ap'l 17th, 1861.

ENOCH SMITH.

Rec'd fourteen hundred dollars on the within 2nd payment of land, through Boyd, Congleton & Co., Ap'l 20th, 1861.

ENOCH SMITH.

Rec'd on the within sixteen hundred and forty-two $\frac{72}{100}$ dollars, July 11th, 1861, as payment on the 2nd payment of land.

ENOCH SMITH.

Rec'd of Boyd, Congleton & Co., per W'm Berry, on the within bond, five hundred & ninety-two $\frac{83}{100}$ dollars, being bal. of debt (of principal) due J. Dooley from W'm Berry, Aug. 19, '61.

$592\frac{83}{100}$.

ENOCH SMITH.

Rec'd of Jabez Dooley, through B., C. & Co., three hundred dollars on the within bond, Nov. 30, '61.

ENOCH SMITH.

Received of Jabez Dooley one thousand dollars, in a check on the Farmers' Bank at Mt. Sterling, this 21st of December, 1861.

ENOCH SMITH.

Rec'd on the within bond four thousand dollars, Jan'y 10, 1862.

ENOCH SMITH.

This bond is closed by a note given for the sum of eight thousand and seventy-nine dollars eighty-three cents, being the last payment,
21 and all, due for my old farm, as witness my hand this 16th of January, 1862.

ENOCH SMITH.

Remarks by clerk.

The deed referred to in pl'ff Smith's petition is not on file in my office.

Summons.

The process was duly executed upon the defendant, Dooley, in this action, and so returned by the sh'ff.

At a circuit court held in the town of Mt. Sterling, county of Montgomery and State of Kentucky, on the 29th day of September, 1868, the following order was made herein, to wit:

Ans. of def't Dooley filed.

ENOCH SMITH
vs.
JABEZ DOOLEY.

"Def't filed his answer herein."

The defendant, Jabez Dooley, for answer, says: That he, on the day of , in the year 1868, before the commencement of the present action, tendered to the plaintiff, in United States legal-tender notes, the full amount of the debt sued for, both principal and interest, which
22 the plaintiff refused to receive in payment of his debt. Thereupon this defendant commenced an action on the equitable side

of this court against the plaintiff, and in his petition in said action alleged the tender, the sum tendered, and the day on which said tender was made, and prayed the court to compel the plaintiff to accept said money and to surrender the note sued on in this action. The pl'ff in this action filed his answer in said action, in which he admitted said tender, as alleged in said petition.

The said petition and answer, and the proceedings in said action, are here referred to and prayed to be taken as part hereof; and this defendant alleges that the statements in said petition as to the sum tendered and the time when the tender was made are true.

This defendant prays that this action may be consolidated with the aforesaid action, and that they may be tried together. And having answered, he prays as in his former action.

JABEZ DOOLEY.

23 Sworn to before me by Jabez Dooley this the 29th Sept., 1868.
I. R. P. TUCKER, *Cl'k.*

Remarks by cl'k.

Pl'ff Dooley's petition and def't Smith's answer, and the other proceedings in case of Jabez Dooley vs. Enoch Smith, referred to in def't Dooley's answer, will be found on pages of this record.

And afterwards, at a court held as aforesaid, on the 17th day of March, 1869, the following order was made herein, to wit:

Am'd pet'n tendered.—Mo. heard.

JABEZ DOOLEY }
vs. }
ENOCH SMITH. }

Pl'ff tendered an am'd pet. herein.
Def't objected to the filing of the same.
Motion heard.

And afterwards, at a court held as aforesaid, on the 18th day of March, 1869, the following order was made herein, to wit:

Affidavit filed.

JABEZ DOOLEY }
vs. }
ENOCH SMITH: }

ff filed his affidavit herein."

Affidavit.

24 The pl'ff states that at the time he brought this action he recollected that he had made the tender set out and relied upon his amended petition, but he did not recollect the sum tendered or the time the tender was made, and having lost the memorandum made at the time, he did not believe that he could prove either the time the tender was made or the sum tendered, as Mr. Baird said he could not recollect the time or the amount without seeing the memorandum; and under these circumstances he was advised by his counsel to make another tender before he brought this suit, and in consequence thereof he made

the tender set out and relied upon in his original petition. He states that he did not find said memorandum, which is set out in his amended petition, until since the last term of this court, and that he offered to file said amended petition as soon as he was able to do so.

JABEZ DOOLEY.

Sworn to before me by Jabez Dooley this March 18th, 1869.

I. R. P. TUCKER, *Clk.*

25 And afterwards, at a court held as aforesaid, on the 19th day of March, 1869, the following order was made herein, to wit:

Am'd pet'n filed.

JABEZ DOOLEY }
vs. }
ENOCH SMITH. }

Pl'ff filed an amended pettition herein, to which def't excepts.

Am'd pet'n.

The plaintiff herein states that he did, on the 14th day of May, 1864, tender to the def't, in United States legal-tender notes, the sum of eight thousand nine hundred and thirty dollars in payment of the note in his original petition mentioned, that the defendant, Smith, held on him, and demanded the def't to deliver to him said note, but the defendant refused to take said money or to give up said note. The said tender was made in the presence of H. J. Baird, who made and delivered to the plaintiff a written statement, showing the time the tender was made and the amount tendered, which statement is herewith filed as a part of this amended petition. Said written statement was mislaid by the plaintiff and has only lately been found by him, and

26 *and* in consequence of its loss he made another tender to the defendant in United States legal-tender notes of the amount of his debt and interest, which he again refused to receive, which last-named tender is the same one that was set up by him and relied upon in his original petition. That he paid to the defendant the interest due on said debt up to the time said tender was made, in May, 1864, the defendant being willing to receive the interest on said debt in legal-tender notes, but refused to take the principal.

JABEZ DOOLEY.

MONTGOMERY COUNTY, *sct:*

The plaintiff, Jabez Dooley, says that the statements of this amended petition are true.

JABEZ DOOLEY.

Sworn to before me by Jabez Dooley, 16th March, 1869.

I. R. P. TUCKER, *Clk.*

SHARPSBURG, *May 14th*, 1864.

The undersigned did, on this day, count for Jabez Dooley

27 $8,930 00 in legal-tender U. S. notes, and the said Dooley did, on the above-named day, tender the amount, $8,930, to Enoch Smith in my presents, & demanded his note of hand of him that Smith held on Dooley, and Smith refused to take the money or give up the note, stating at the time it was not the money he contracted for, & that he would take the old farm back.

H. J. BAIRD.

And afterwards, at a court held as aforesaid, on the 24th day of March, 1869, the following order was made herein:

Response to rule filed.—Dem'r filed.

JABEZ DOOLEY
vs.
ENOCH SMITH.

Pl'ff filed his response to rule herein. Def't filed a demurrer. Submitted on dem'r.

Response to rule.

The pl'ff, Dooley, in answer to the rule herein, says that after he tendered the money herein, & after it was brought into court or put into bank and agreed by both parties to be in and considered in court, he took the same out of court, under the arrangement contained in
28 the note from Smith to him, dated 14th of March, 1868, which was both written & signed by the def't, Smith, & by virtue of a consent order of this court, directed to be made in this case, & if not, & entered, it was omitted by mistake, & was ordered & directed to be made, & was drawn in writing, & the clerk directed to enter it; that when he so got said money it was understood between him & Smith that he was to use it until the end of this litigation, & he is surprised at def't's calling on him to file it in court at this time, & his so doing is in violation of their arrangement; that the amount is large, & he cannot raise & pay it into court in a few days, and hopes the court will allow him a reasonable time to do so. He is willing to pay interest on said money in the mean time, & to give any security to have it forthcoming at a future court, or at the time of the decision herein that the court may require; if the fund were in court it would have to be loaned out through a receiver. The debt of Smith on this def't is amply secured by lien on real estate & land, worth more than twice the
29 amount, & perhaps three times it. Through his counsel he has examined the record, & cannot find the entry that was directed to be made in this case as af's'd.

T. Turner says he is of counsel for pl'ff & knows that a consent order was directed to be made & entered herein, by which it was agreed the am't named in pl'ff's petition was brought into court, and by which it was agreed pl'ff, Dooley, should take it out & use it during the litigation, but the effect was to be the same as if the money in greenbacks were in court all the time; he has had examined the records & cannot find said order, but knows it was directed to be entered, and thinks it was reduced to writing by Hon. Ja's Simpson. Dooley says he took the money out of court at the solicitation of Smith.

JABEZ DOOLEY.
THO'S TURNER.

Sworn to before me by Jabez Dooley & T. Turner, March 24th, 1869.
C. BROCK,
Examiner for Montgomery County.

30 *Def'ts dem'r.*

The def't says that the matters and things asserted and alleged by the pl'ff are not sufficient to enable him to maintain the action.

ELLIOTT & METCALFE,
A. for Def't.

And afterwards, at a court held as aforesaid, on the 27th day of March, 1869, the following judgment was rendered herein, to wit:

Judgment.

JABEZ DOOLEY
vs.
ENOCH SMITH.

ENOCH SMITH
vs.
JABEZ DOOLEY.

The question involved in this case is res adjudicata in Kentucky.

The opinion of the appellate court in Griswold vs. Hepburn, 2 Duvall, 21, is clear and exhaustive, and this court deems it only necessary to refer to its conclusive reasonings and adopt them as the ground of its opinion.

This case illustrates forcibly the justice, wisdom, and accuracy of the principles announced in Griswold vs. Hepburn. The note sued on is for balance of purchase money of a tract of land sold in Nov., 1859, and bears date Jan'y 16, 1862. The legal-tender act declaring treas-
31 ury notes lawful money and a legal tender was enacted 25 Feb'y, 1862. It is but fair to presume that the parties contracted with reference to lawful money at the date of the sale, and also at the date of the execution of the note.

It is, therefore, adjudged that the defen'ts demurrer to plaintiff's petition in the case of Dooley vs. Smith be, and the same is hereby, sustained, and said petition is dismissed at Dooley's costs. It is also adjudged that the demurrer to defen'ts answer in the case of Smith vs. Dooley be, and the same is hereby, sustained; and it is further adjudged that Smith recover of Jabez Dooley eight thousand and seventy-nine dollars and 83 cents, with interest thereon at six per cent. per annum from May 15th, 1864, till paid, and his costs herein expended; and Smith, for the present, waiving any judgment for the enforcement of his lien, this cause is continued; Dooley excepts to this judgment and prays an appeal to the court of appeals, which is granted.

32 And afterwards, at a court held as aforesaid, on the 28th day of Sept., 1869, the following order was made herein, to wit:

Order to file away.

JABEZ DOOLEY
vs.
ENOCH SMITH.

ENOCH SMITH
vs.
JABEZ DOOLEY.

These cases are ordered to be filed away at Dooley's cost. Enoch Smith will recover his costs herein.

The following is an appeal bond executed and filed in clerk's office October 18th, 1869:

Appeal bond.

Two cases.

JABEZ DOOLEY, APPELLANT,
against
ENOCK SMITH, APPELLEE,
and
JABEZ DOOLEY, APPELLANT,
against
ENOCH SMITH, APPELLEE.

Whereas said appellant is about to take an appeal from the judgment of the Montgomery circuit court, rendered at its March term, 1869, against him in favor of the appellee for the sum of eight thousand and seventy-nine dollars, with interest thereon at the rate of six per
33 cent. per annum from the 15th day of May, 1864, till paid, with costs; and the appellant desires to supersede the said judgment: Now we, William Scobee and Robert Scobee, sureties, do hereby covenant to and with the appellee, Enoch Smith, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid.

Witness our hands this the 18th day of October, 1869.

WILLIAM SCOBEE.
ROBERT SCOBEE.

Attest:

I. R. P. TUCKER, *Clk.*

STATE OF KENTUCKY,
Montgomery circuit court, set:

I, I. R. P. Tucker, clerk of the court for the State and circuit
34 aforesaid, do certify that the foregoing twenty-five pages contain a true copy and transcript of all the proceedings had and done in the case therein named, and the cause therein referred to during its pendency in said court, according to the records of my office.

Witness my hand as clerk aforesaid this 18th day of October, 1869.

I. R. P. TUCKER, *Clk.*

And afterwards, to wit, at a court held as aforesaid, on the 21 Feb'y, 1870, the following order was entered:

Order of submission.

DOOLEY *vs.* SMITH. } Montgomery.

This cause came on and was heard, but the court not being fully advised took time.

And afterwards, at a court held as aforesaid, on the 10 March, 1870, the following order was entered:

JABEZ DOOLEY
vs.
ENOCH SMITH. } Montgomery.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

35 *Judgment.*

It is, therefore, considered that said judgment be affirmed, and that the appellee recover of the appellant ten per centum damages upon the amount of the judgment superseded, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellants his costs herein expended.

And afterwards, at a court held as aforesaid, on the 31 May, 1870, the following order was entered:

Order filing petition for rehearing.

DOOLEY
vs.
SMITH. } Montgomery.

Came appellant, by counsel, and filed a petition for rehearing herein, but the court not being fully advised took time.

And afterwards, at a court held as aforesaid, on the 8 June, 1870, the following order was entered:

DOOLEY
vs.
SMITH. } Montgomery.

The court being sufficiently advised, it is considered that the petition for rehearing herein be overruled.

36 STATE OF KENTUCKY,
Court of appeals, set:

I, Alvin Duvall, clerk of the court of appeals for the State of Kentucky, do certify that the foregoing twenty-seven pages contain a true transcript of all the proceedings had and done in the appeal therein named, and the cause therein referred to during its pendency in said court, according to the records of my office.

Witness my hand as clerk of said court, with the seal of said court, this 10th day of June, 1870.

[SEAL.] A. DUVALL, *Clk Ct App.*

Fee, $8 00.

(Indorsement on cover:) No. 464. Jabez Dooley, plaintiff in error, vs. Enoch Smith, Kentucky court of appeals.

Filed 14th July, 1870.

Supreme Court of the United States.

JABEZ DOOLEY, Appellant,

vs.

ENOCH SMITH, Appellee.

Brief for Appellant.

GARRETT DAVIS,
For Appellant.

Pearson, Printer, corner 9th & D sts., Washington, D. C.

Supreme Court of the United States.

JABEZ DOOLEY, Appellant,
vs.
ENOCH SMITH, Appellee. } Appeal.

This record shows that Smith, the appellee, sold to Dooley, by written contract signed by them, and containing mutual stipulations, bearing date November 11, 1859, 330 acres of land at $93.15 per acre, payable in three equal payments, the first to be paid 15th March ensuing, when full possession was to be given by Smith to Dooley; and the second in one, and the third in two years from that date; that the parties executed the contract in duplicate form; and that of Smith was exhibited by him with one of his pleadings, and has ten payments endorsed upon it, amounting in the aggregate to $23,399.53, and then follows an endorsement in these words: "This bond is closed by a note given for the sum of eight thousand seventy-nine dollars eighty-three cents, being the last payment, and all, due for my old farm, as witness my hand this 16th of January, 1862. Enoch Smith." A portion of the last instalment of the purchase money had been paid, and this note was given for the residue, but the larger bulk of it, and it also was brought into court by Smith and filed with his pleading aforesaid, and has endorsed upon it "Interest on the within paid to 15 November, 1863." "Interest paid to 15th May, 1864."

Dooley commenced this action by filing his petition against the said Enoch Smith, in the Montgomery Circuit Court of the State of Kentucky, the 11th February, 1868, in which he sets up: That on the 6th of January, 1868, his said note of $8,079.83 to Smith, and the interest unpaid and then due and owing upon it, amounted to $9,843.92; and that he had made partial payments on it to reduce its amount then to that sum; and that he did, on that day, tender to said Smith the sum of $9,843.92 in United States legal-tender treasury notes, commonly called "greenbacks," in payment of said promissory note, and demanded its surrender of said Smith; and that he refused to receive the treasury notes so tendered, and also to deliver to him, Dooley, said promissory note. Said petition further states that Dooley brings $9,843.92 in United States legal-tender treasury notes into court and again tenders them to Smith in payment of the aforesaid promissory note, and demands of him to surrender it to him, Dooley. Said petition also states that about the 15th of May, 1864, the said Dooley tendered to Smith the full amount of his aforesaid promissory note in United States legal-tender treasury notes, commonly called "greenbacks," and demanded of him the surrender of said promissory note, and he, Smith, refused to receive said treasury notes so tendered to him, and also to surrender to Dooley the said promissory note. Said petition also states that said Dooley has always been willing, and has repeatedly offered, to pay the debt due by said promissory note. He prays that said Smith be required to accept payment of his debt in United States legal-tender treasury notes, to give up to him, Dooley, his said promissory note, and for general relief. Process was issued on this petition and served on Smith, and he filed a general demurer to it, 17th March, 1868, and an order was then made upon the record submitting the case.

Two days afterwards, on the 19th of March, a consent

order was entered on the record in these words: "The parties appeared in court, and the defendant admitted that the sum mentioned in the plaintiff's petition had been tendered to him at the time and in the manner therein alleged, in United States legal-tender treasury notes, and that said sum, thus tendered, had been brought by plaintiff into court in pursuance of said tender; and thereupon the defendant consented that the plaintiff might withdraw said sum of money and use it in any way he pleased, and that the legal effect of the tender should be the same as it would be if the money were to remain in court, and no other effect is to be given to this consent order by which the right of the defendant to contest the validity and legality of said tender, is not to be in any manner affected."

This consent order of record is conclusive upon the points that Dooley did, on the 6th of January, 1868, tender to Smith $9,843.92, in legal-tender treasury notes, as payment of his $8,079.83 promissory note, and demanded of him the surrender of said promissory note, and that said Smith refused to receive the treasury notes, and also to give up the promissory note, and that Dooley brought said treasury notes in pursuance of said tender into court, and Dooley withdrew them with permission to use them as special receiver. Said treasury notes remained quasi in the custody of the court and subject to its order.

This case of Jabez Dooley vs. Smith was thus standing on the issue of law arising upon the plaintiff's petition, and the defendant's general demurrer to it, and the consent order of record aforesaid of the parties, and in that state it continued until the 19th of March, 1869, when the court permitted Dooley to file an amendment to his original petition, in which he stated that on the 11th of May, 1864, he tendered to said Smith eight thousand nine hundred and thirty dollars, in United States legal-tender treasury notes, in payment of the $8,079.83 promissory note set out in his original petition, and demanded

of him said promissory note; that Smith refused to receive the treasury notes so tendered, and also to surrender the promissory note, and that he, Dooley, paid to Smith the interest that had accrued on said debt up to that time in said legal-tender notes, he being willing to receive the interest thereon, and receiving it in said legal tender notes, but refusing to receive the principal in that money.

The filing of this amended petition was the only change or addition that had been made in the pleadings or in the case since the defendant, Smith, had filed his general demurrer to the plaintiff's original petition, and, after the filing of this amendment, the defendant, Smith, on the 24th of March, 1869, filed his general demurrer to both the original and amended petitions, and upon the issue thus formed the judgment of the court was "that the defendant's demurrer to the plaintiff's petition, in the case of Dooley vs. Smith, be, and the same is hereby, sustained, and said petition is dimissed at Dooley's costs."

What were the facts in this case that were judicially true, upon the record, arising from Dooley's petition and amended petition, and Smith's general demurrer to them, and the agreement of the parties of record hereinbefore recited? I will state them: 1st, from the time that Dooley's note of $8,079.83 to Smith fell due, on the 15th of March, 1862, up to the time of the institution of this suit, Smith refused to receive legal-tender treasury notes in payment of his debt, and uniformly declared to Dooley that he would not take that money in payment of it; 2d, that Dooley, on the 14th of May, 1864, did tender to Smith, in payment of said note, $8,930 of United States legal-tender treasury notes, a sum in excess of its amount, principal, and interest at that date, and demanded said note of him, and Smith refused to receive the said treasury notes so tendered to him, and also refused to surrender to Dooley said promissory note, but agreed to receive the interest, which had then accrued and was un-

paid on said note, in legal-tender treasury notes, and Dooley did then and there pay him the amount of said interest in that money; 3d, that said Dooley, on the 6th of January, 1868, did tender to said Smith $9,843.92 of United States legal-tender treasury notes in payment of his said promissory note for $8,079.83; that there had been previous partial payments on said note, so that said note, including the unpaid interest on that day, did not exceed the sum of $9,843.92, and this sum, in United States legal-tender treasury notes, the said Dooley did then tender to said Smith in payment of said promissory note, and demanded of him to deliver up said note to him, said Dooley, and said Smith refused to receive the said treasury notes so tendered to him by Dooley, and also refused to deliver to him the promissory note for $8,070.83; 4th, that on filing his original petition said Dooley brought said $9,843.92 in legal-tender treasury notes into court, in pursuance of his tender of them to said Smith on the 6th day of January, 1868, and by his petition there again tendered them to said Smith in payment of the promissory note aforesaid, and demanded the delivery thereof to him, said Dooley, and that said Smith refused to receive the said legal-tender notes so brought into court, and also refused to give up the said promissory note to said Dooley.

From about the time said note fell due Dooley had always told Smith that he intended to pay it in United States legal-tender notes, and Smith always declared to him that he would not receive that kind of money in its payment; he required gold and silver coin. This state of things continued between them for near six years, and during that long period Smith did not and would not sue, and why? He was afraid of the legal-tender treasury note question. Dooley had twice, with an interval of nearly four years, formally tendered to Smith the full amount of the note, including all interest due and unpaid on it at each time in United States legal-tender

treasury notes and demanded its surrender to him; both were refused by Smith and yet he would not sue. Was Dooley without all remedy? He had a remedy to which he resorted. He filed his petition in equity, setting up all the facts, and prayed the court to require Smith to bring his note into court to be delivered up to him, again taking into court and tendering the money in payment of it.

His tenders did not at common law satisfy and discharge his note nor bar him from being sued upon it, but they stopped interest from running upon it and gave him the right to go into a court of equity, carrying the money which he had before tendered with him, and there by the interposition of the chancellor to get possession of his note, and the Kentucky court should have overruled Smith's demurrer to his petition, and if no further answer to it was put in, and should, by its formal decree, have sustained the case of Dooley, entered up a perpetual injunction against Smith suing on the note, and made a rule on him to bring it into court for delivery to Dooley.

But during the pendency of Dooley's petition aforesaid, on the 11th of August, 1868, Smith did sue in the said Montgomery circuit court for the recovery of the amount of his note of $8,079.83 on Dooley, and with his petition he filed the note and his duplicate of the agreement of sale of the land between Dooley and himself, with ten payments endorsed upon it and with a memorandum of the execution of the $8,079.83 note in full satisfaction of it, all signed by himself, but he did not file the deed from himself and wife to Dooley.

On the 29th September, 1868, Dooley filed his answer to said petition, in which he sets up his tender of the full amount of the debt Smith had sued for to him in United States legal-tender notes, on the —— day of ———, 1868, and Smith's refusal to receive the money so tendered; he also refers to and makes the petition which he had previously filed against Smith covering the same matters,

Smith's answer, and the proceedings in said action parts of his answer. Thus both the tenders which Dooley in 1864 and 1868 made and all the other facts charged in his petition and admitted by the parties upon the record are made parts of his answer to Smith's petition and are part of the record in that case.

On the 13th of January, 1869, the parties made a consent order consolidating the two cases and agreeing that Richard Reid should act as judge to try them.

Smith, on the 24th March, 1869, filed his general demurrer to the answer of Dooley to his petition, and the case was submitted on this demurrer, and on the 29th March the court rendered judgment in these words:

"Judgment. Jabez Dooley vs. Enoch Smith. Enoch Smith vs. Jabez Dooley.

"The question in this case was res adjudicata in Kentucky.

"The opinion of the appellate court in Griswold vs. Hepburn, 2 Duvall, 21, is clear and exhaustive, and this court deems it only necessary to refer to its conclusive reasonings and adopt them as the ground of its opinion.

"This case illustrates forcibly the justice, wisdom, and accuracy of the principles announced in Griswold vs. Hepburn. The note sued on is for balance of purchase of a tract of land sold in November, 1859, and bears date January 16, 1862. The legal-tender act, declaring treasury notes lawful money and a legal-tender, was enacted 25th February, 1862. It is but fair to presume that the parties contracted with reference to lawful money at the date of the sale, and also at the date of the execution of the note.

"It is, therefore, adjudged that the defendant's demurrer to the plaintiff's petition in the case of Dooley vs. Smith be, and the same is hereby sustained, and said petition is dismissed at Dooley's costs. It is also adjudged that the demurrer to defendant's answer in the case of Smith vs. Dooley be, and the same is hereby sustained; and it is further adjudged that Smith recover of Jabez Dooley eight thousand and seventy-nine dollars and eighty-three cents, with interest thereon at six per centum per annum from the 15th day of May, 1864, till paid

and his costs herein expended; and Smith, for the present, waiving any judgment for the enforcement of his lien, this cause is continued."

To that judgment Dooley excepted, and prayed an appeal to the court of appeals, which was granted, and on hearing in that court it ruled in these words: "The court being sufficiently advised, it seems to them that there is no error to the judgment herein; it is, therefore, considered that said judgment be affirmed, and that the appellee recover of the appellant ten per centum damages upon the amount of the judgment superseded, which is ordered to be certified," &c.

The judgment of the Court of Appeals of Kentucky is a simple and full affirmance of the judgment of the circuit court, and is to be considered, and will have all the operation and effect, as if written out in *eadam verba*.

From this judgment of the state court Dooley has appealed to this court, and one of the questions made for Smith, the appellee, is its jurisdiction to entertain the appeal. I concede, that to give this court jurisdiction, it must appear in the record, either by express words or by clear and necessary intendment, that the state court decided a *federal question*, that is, a question of which the United States courts can properly take jurisdiction, to the prejudice of the appellant, Dooley. Was such a question so decided by the Kentucky court, and does this record show it?

The pleadings and record make up and show but a single question, one only issue; was the tender or either of the tenders of the United States legal-tender treasury notes made by Dooley to Smith in payment of the $8,079-.83, a legal and sufficient tender?

Smith cannot, now and here, make any question as to the amount of the treasury notes tendered to him by Dooley, because on both occasions he declared that he would not receive United States legal-tender treasury notes in payment of the debt, and Dooley being at the

time of each tender ready and willing to pay the debt in that money, and Smith at both times declaring that he would not receive payment of his debt in that money, he thereby dispensed with the *production* of the money by Dooley, and his tender was good without it.

Nor can it now be objected that the first tender, or either tender, made by Dooley was of a larger sum than was then due upon the note, for Smith did not object to the tender upon that ground, but only because it was made in legal-tender treasury notes.

But not only the pleadings in the case show only a single question in it, but so does the judgment of the Kentucky court. "*The question* involved in this case is *res adjudicata* in Kentucky." That question was the legality and validity of a tender of United States treasury notes in payment of the debt sued for by Smith. That right of tender was of recent origin, and was derived from the act of Congress of 25th of February, 1862; there was no other authority, real or colorable, for it, and it was impossible for any court to consider and decide this question without having that act of Congress brought distinctly to its attention, and passing upon it. The judgment itself refers to that act, *eo nomine*, and shows that it was considered by the court, and decided not to have the effect to sustain the tenders which Dooley had made to Smith, and which alone, and nothing besides, he had set up in his pleading and was then relying upon; and thus the court withheld from Dooley a right and a defence in this suit which that act of Congress gave him.

In the case of Crowell vs. Randall, 10 Pet., 568, opinion by Justice Story, it is held: "That it is not necessary that the question (the federal question) should appear on the record to have been raised and the decision made in direct and positive terms, *ipsisimis verbis*, but that it is sufficient, if it appears by clear and necessary intendment that the question must have been raised and must have

been decided in order to have induced the judgment, it is sufficient."

In the case of Armstrong et al. vs. Treasurer, 16 Pet., 281, it is held that the record must show that the federal question did arise and was decided by the state court "either by express averment or by necessary intendment in the pleadings in the case."

"Or, in proceedings in equity, it may be stated *in the body of the final decree of the state court* from which the appeal is taken to this court."

"Or it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed without deciding it."

In the case of The Bridge Proprietors vs. Hoboken Company, 1 Wall., 116, this court declared: "But the true and rational rule is, that the court must be able to see clearly, from the *whole record*, that a certain provision of the Constitution or *act of Congress* was relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied."

It is not held that the *judgment* of the state court should make the showing that gives this court jurisdiction; it is sufficient if it appear *anywhere in the record proper*. In cases where the judgment of the court and the opinion of the judges are separate and distinct, and the latter are no part of the record proper, this court has decided that they cannot be relied upon to show that a federal question was actually before the state court, and decided by it. But in this case the language which shows that the legal-tender act was, in fact, before the state court, and considered by it, is incorporated with its judgment, is a part of its verbage. It is set forth in the body of the final decree or judgment from which this appeal is taken, and if legal acumen can separate it from the *judgment* of the state court, it cannot be removed from the *record*, and

as part of the record, and also as being stated in the body of the final decree or judgment of the state court appealed from, by the opinion and authority of this court, is, both or either, sufficient to show that this federal question was made to, and decided by, the Kentucky court. It arose of necessity, because the pleadings made up the single question of the sufficiency of Dooley's tenders to Smith, and this act of Congress was all and the only law for the court to consider and pass upon in deciding that question, and we also know both by clear and necessary intendment, and by the language incorporated in its judgment, that the court did consider that act, and decided that it did not authorize those tenders.

It clearly appears from the whole record in this case that in the Kentucky court that the act of Congress of February 25, 1862, authorizing the payment of debts in United States legal-tender treasury notes was relied upon by Dooley to sustain the tenders which he had made to Smith in its payment, and that the right which he claimed under said act was denied by the Kentucky court, and this court has jurisdiction to correct that erroneous judgment.

I will make a summary statement of the other points, and authorities to sustain them, upon which I rely for Dooley.

He had a right to pay his debt to Smith in United States legal-tender treasury notes, and his tenders in that money had the same validity, and all the effects as if made in United States gold and silver coin.—(Act of 25th February, 1852, U. S. Statutes at Large, 345.)

That Dooley, on the 14th of May, 1864, and also on the 6th of January, 1868, did tender to Smith the full amount of said debt owing on those days respectively, in United States legal-tender treasury notes, and on each occasion demanded of Smith his promissory note of $8,079.83, and Smith refused to receive the money so tendered, and also to deliver to him said promissory note.

That Dooley, at each of those times, having the money in those legal-tender notes, and being ready and offering to pay said debt with them, and Smith declaring to him that he would not receive them in payment of his debt, relieved Dooley from counting them, or producing them. —(2 Greenleaf Ev., 603; Alexander vs. Brown, 1 Ct., p. 288.)

If Dooley, in making either or both said tenders, had and made a tender of a larger amount of legal-tender notes than Smith's debt, the latter objecting to the tender because it was made in legal-tender treasury notes, and taking no other exception to the tenders, cannot make any question upon any excess of amount tendered. —(Do., 604; Cole et al. vs. Blake, Peak's N. P., 121; Saunders vs. Graham, Gow., 124; Cadman vs. Lubbock, 5 Don. & Ral., 289; Snow vs. Perry, 9 Pick., 502.)

Smith having declared to Dooley on the occasion of both tenders, and always, both before and afterwards, that he would not receive United States legal-tender notes in payment of his debt, Dooley was thereby relieved of any duty or obligation to be always ready to pay said debt.—(Do., 601.)

After Smith's debt fell due, Dooley having twice tendered to him its full amount and demanded the surrender of his note, and Smith having at both times refused to receive the money and to deliver to Dooley his note, and having then and always declared to him that he would not receive payment of his debt in legal-tender notes, Dooley had the right to go into a court of equity to compel Smith to deliver up to him his note, and for all other proper relief, and the Kentucky court should have sustained his tenders to Smith, and compelled the surrender of his note to him by Smith.—(Story Eq. Jurisp., vol. 1, p. 700, and the many authorities referred to in note; Hamilton vs. Cummings, 1 John. Ch., 520; Piersoll and others vs. Elliott and others, 6 Pet., 95; Mershow vs Bank of Commonwealth, 6 J. J. Mar., 438.)

Although the tender by Dooley of payment of Smith's debt after it fell due would not, at common law, form a bar to Smith's bringing suit for it, nevertheless, such tender would stop the running of interest upon it, and Smith having afterwards brought suit in the same court for his debt, and Dooley having filed his answer, in which he set up those tenders and Smith's refusal of them, and all the other facts relied upon in his petition in equity vs. Smith, the record, papers, and proceedings in which he referred to as parts of his answer to Smith's petition, and the money which Dooley had tendered to Smith being in the same court, that court should have dismissed Smith's petition and made the proper orders to have given to him the money which Dooley had brought into court in pursuance of his tender.—(See the authorities in immediately preceding reference; Greenl. Ev., 607; Suffolk B. vs. Wooster B., 5 Pick., 109; Dent vs. Dunn, 3 Campb., 296; Zeren vs. Cowell, 3 Taunt., 202; Do., Roberts vs. Lambert, 284.)

Dooley is entitled to all the benefits of his first tender, on the 14th of May, 1864: that tender then stopped the running of interest on the debt for which he made it; and the Kentucky court should have ascertained the amount that was then due upon his note to Smith, and made an order permitting Smith to take that sum from the money that Dooley had brought into court, and he, Dooley, to withdraw the residue, and have rendered a judgment in his favor for costs. These positions are fully sustained by the authorities last before cited.

The Kentucky court was trying the case of Dooley vs. Smith, and of Smith vs. Dooley, by consent, as a consolidated case, and either as a court of equity or common law jurisdiction, was fully competent to have afforded the relief here claimed for Dooley.

GARRETT DAVIS,
For Appellant, Jabez Dooley.

Supreme Court of the United States.

DECEMBER TERM, 1871.

JABEZ DOOLEY, *Plaintiff in Error,*

vs.

ENOCH SMITH.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendant, by W. H. Wadsworth.

Smith the defendant, sold a valuable farm in Montgomery county, Kentucky, to Dooley the plaintiff in error, November 11, 1859.

Dooley was let into possession and paid all the purchase money (not punctually) on the contract, except $8,079.83, and for this sum executed his note, dated January 16, 1862, payable March 15th, following.

Dooley failed to pay his note at maturity, at which time the price of gold was from 3 to 3¼, but waited over two years, and until the 14th of May, 1864, when he tendered to Smith, in payment of the debt, $8,930, in United States notes, "lawful money and a legal tender," &c., by virtue of the act of Congress of February 25, 1862, being $200.20 less than the principal and legal interest, (6 per cent. in Kentucky.)

The price of gold at date of this tender was 72 to 72¼; the market excited, the price running up to 185 by the 11th of July following.

Smith refused to take the sum thus tendered, but accepted the interest in the lawful money, to that date.

Dooley seems to have used the money, for he forgot the amount tendered; and so, on the 6th of January, 1868, he again tendered to Smith, in payment of the debt, $9,843.92, in United States notes, being $2.66 less than the full amount then due.

The price of gold at this time was 35½. Smith refused the tender.

February 11th ensuing Dooley brought a petition in equity, under the code of civil practice, in force in Kentucky, in the Montgomery circuit court, against Smith, setting up both tenders, and praying that Smith might be compelled to take the amount *then* due him in United States notes. He does not seek a conveyance of the land, *or any other relief but just this.*

He avers that he was always *willing* to pay the debt, but does not aver *readiness*, either before or after the tenders; nor does the petition bring the money into court.

Smith filed a general demurrer to this petition.

Afterwards, Smith also brought a petition in equity against Dooley, in the same court on the note, tendering a conveyance of the land, setting up a lien for the purchase money unpaid, praying a judgment on the note and a sale of the land to pay it.

To this Dooley answered, referring to his petition against Smith, and pleading the tenders therein set up, as therein set forth without addition, and this, intended as a plea in bar, was all the answer made.

To this answer Smith filed a general demurrer.

The two actions were consolidated, and the circuit court sustained both demurrers, dismissed Dooley's petition, and rendered judgment against Dooley on Smith's petition for the debt and interest. This judgment was for dollars, not coined dollars.

On appeal by Dooley to the appellate court of Kentucky, the judgment of the lower court was affirmed; this judgment of the appellate court is now here on a writ of error to the State court, sued out by Dooley.

THIS COURT HAS NO JURISDICTION.

The jurisdiction under the 25th section of the act of 1789 has been defined by this court in a great number of cases, and always in the same precise terms.

To give the jurisdiction, it must appear on the face of the record, or otherwise, since the amendment of February 5, 1867, for aught I need care in this case, that (1) one of the questions stated in that section of the act arose, and (2) that the question was decided by the State court as required by the act.

These conditions do not subsist unless "it appears by clear necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment."

Crowell *vs.* Randell, 10 Pet., 397–8;

Where Judge Story examined all the cases.

"It must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it."

Parmelee *vs.* Lawrence, 11 Wall., 38.

Furman *vs.* Nichol, 8 Ib., 56.

It must appear that the case was necessarily decided on that question, and that the proposition was essential to the judgment.

Gibson *vs.* Chouteau, 8 Wall., 318.

An act of Congress may be drawn in question by the State court, but if it does not appear that it was necessarily drawn in question, this court will not take jurisdiction.

Parmelee *vs.* Lawrence, *supra*, 39.

All the cases are to the same effect.

If the judgment is right on other grounds cognizable by the State court alone, this court will not revise the judgment.

It is true, the State circuit judge in his opinion, as a reason for giving judgment, says the act of Congress is invalid, but his *opinion* is no part of the judgment.

If the latter is correct, the bad reason given by the judge will not vitiate the judgment.

Besides, this writ is to the judgment of the appellate court, and this assigns no such reason, but simply affirms the judgment of the lower court.

It happens sometimes, at least in Kentucky, that the judgment of the lower court is approved and its reasons overruled.

"If the judgment should be correct, although the reasoning by which the mind of the judge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior court."

Ch. J. Marshall, in Williams *vs.* Morris, 12 W., 120.

The opinion of the State court cannot be resorted to for the purpose of showing that a question of Federal cognizance was decided by the State court.

Ib.:
Rector *vs.* Ashley, 6 Wall., 142.
Gibson *vs.* Chouteau, *supra*, 317.
Insurance Co., *vs.* Treasurer, 11 Wall., 208.

In this last case the lower State court had placed the judgment on the decision of a Federal question, but it was held by this court that such a question did not appear in the record.

The judgment of the appellate court of Kentucky does not necessarily decide any Federal question.

It is eminently correct on other grounds, not cognizable by this court on error to the State court.

1. *There was no equity in the petition of plaintiff in error.* He could not resort to equity to enforce acceptance of a tender merely. His remedy was complete and adequate at law, and on this ground the demurrer to his petition was well taken, and the judgment dismissing the petition, correct. The Kentucky court

has decided that equity has no jurisdiction where there is a complete, adequate remedy at law in so many cases, I will not quote them.

2. A court of equity, in Kentucky, would not let the vendee keep both land and money, without either rents or interest.

Boyce *vs.* Prichard, 6 Dana, 231.

3. Nor assist the vendee, to compel the vendor to accept a depreciated paper, in discharge of the purchase money due on a contract made in 1859, and tendered years after maturity; the parties having contracted and fixed the price with reference to the only lawful money at the time. So ruled in

Willard *vs.* Tayloe, 8 Wall., 557.

There this court required Willard to pay the gold, although he had made his tender in time, and did not lay by after a breach of his contract for years, to take advantage of an excitement in the gold market, and thus profit by his gross *laches* to inflict a severe loss on his vendor.

Was there any abuse of discretion by the State equity court in refusing to lend its aid to such a complainant?

4. It has been often held that where the complainant has been guilty of delay amounting to *laches*, and the circumstances of the parties or property have so changed that to aid the complainant would work an injury to the other party, equity will dismiss him to his remedy at law.

Holt *vs.* Rogers, 8 Pet., 420.
Dorsey *vs.* Packwood, 12 H., 126.
Brashier *vs.* Gratz *et al.*, (Ky. case,) 6 W., 528.

But the tender which constituted the sole ground of equity in Dooley's petition, and his only defense in the answer, was plainly bad.

1. It was for less than the principal and legal interest on both occasions.

2. It was made two years in one case, and six in the other, after a breach of his contract by plaintiff in error.

2 Greenleaf Ev., Sec. 607.

3 Chitty Com. and Man., 136.

3. Readiness was not shown by the petition or answer, either before or after the tenders.

This was always bad in Kentucky.

Slack *vs.* Price, 1 Bibb, 273.

In this case it is decided that the party must show in his plea that he was *tout temps prist.*

"The plea ought to have alleged that from the time of making the award he had been ready until the time of the alleged tender, and that he had always afterwards been ready," p. 274.

This is the common law.

3 Chitty Pleading, 922, 955.

Giles *vs.* Harris, 1 Ld. Raymond, 254; and Saldkeld, 622, quoted, Giles *vs.* Hart.

Other objections might be taken to the sufficiency of the tender.

A court of equity must be expected to bring to the test of the strictest rules, a plea of tender, made long after a breach of the contract, by a party who keeps both land and money, made in depreciated paper not lawful money at date of the contract, nearly at par when the breach was committed—especially when this direlict seeks a forfeiture of the interest also.

Equity will defeat such a tender as that if possible; if it grants

any relief at all it will be on terms to pay in the money which fixed the price.

Willard *vs.* Tayloe, *supra.*

There being no Federal question apparent on the face of the record (or otherwise appearing) I respectfully move the court to dismiss this writ.

W. H. WADSWORTH,
For Defendant in Error.